Child Protective Proceedings Involving Indian Children

Chapter 20

Summary of Contents

20.1 General Requirements of the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., mandates that state courts adhere to certain minimum procedural requirements before removing Indian children from their homes. 25 USC 1902. Because ICWA is federal law, it preempts conflicting state law.

However, several of the procedural requirements of ICWA are less stringent than statutory and court-rule requirements in Michigan. When applicable state law contains higher standards than ICWA, a court must apply those higher standards. See 25 USC 1921.*

*These higher standards are noted in this chapter, when relevant.

Several procedures required under ICWA overlap with the procedures generally applicable to child protective proceedings. This chapter discusses procedures unique to the Indian Child Welfare Act. The following procedures are discussed elsewhere in this benchbook:

- **F** Both parent and child have the right to court-appointed counsel in protective proceedings in Michigan. See 25 USC 1912(b).*

*See Sections 7.9 and 7.10.

- **F** All parties to a child protective proceeding have the right to examine all reports and documents filed with the court. 25 USC 1912(c).*

*See Section 22.2.

*See Section 8.2.

- **F** Children accepted for foster care or preadoptive placement must be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity to his or her home, again taking into account any special needs of the child. 25 USC 1915(b).*

20.2 Purpose of the Indian Child Welfare Act

The purpose of the Indian Child Welfare Act is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families and their placement in foster or adoptive homes that reflect the unique values of Indian culture, and to provide assistance to Indian tribes in the operation of child and family service programs. 25 USC 1902.

20.3 Determining the Applicability of the Indian Child Welfare Act in a Specific Case

If an Indian child, as defined in the Indian Child Welfare Act, is the subject of a "child custody proceeding," the procedures in ICWA and MCR 5.980 must be used. MCR 5.980(A).

- **F** "Child custody proceedings" include actions involving foster care, guardianship, and preadoptive placements, and termination of parental rights. 25 USC 1903(1)(i)–(iii).
- **F** "Indian child" is defined in 25 USC 1903(4) as any unmarried person who is under age 18 and is either a member of an Indian tribe or eligible for membership and is the biological child of a member of an Indian tribe. The tribe's determination of its membership is conclusive. *Santa Clara Pueblo v Martinez,* 436 US 49; 98 S Ct 1670; 56 L Ed 2d 106 (1978).

Tribes set their own eligibility requirements, and there is no specific degree of Indian ancestry that qualifies a child for tribal membership. In *In re Elliott,* 218 Mich App 196, 201–06 (1996), the Court of Appeals held that a Michigan court may not make an independent determination as to whether the child is being removed from an "existing Indian family" in deciding whether ICWA applies. The trial court ruled that the issue of the child's membership or eligibility for membership in an Indian tribe need not be addressed since Native American culture was not a "consistent component" of the child's or mother's life. *Id.,* at 200. The Court of Appeals reversed, holding that a judicially created "existing Indian family" exception to ICWA violated the plain terms of the federal statute and failed to adequately protect the interests of the Indian tribes in involuntary custody proceedings. *Id.,* at 204–06. See also *In re Shawboose,* 175 Mich App 637, 639–40 (1989) (ICWA was inapplicable because respondent was not enrolled as a member of any tribe, and all tribes contacted declined to intervene).

A. Family Independence Agency's Responsibility

The Family Independence Agency's *Services Manual, Children & Youth*, contains detailed procedures to be followed by Child Protective Services and Foster Care workers in identifying and determining an Indian child's heritage. See Items 713, pp 1–2, and Items 740–753.

In *In re IEM,* 233 Mich App 438, 444–47 (1999), at a preliminary hearing, the referee received inconclusive answers from the respondent-mother to his questions concerning respondent's tribal membership. The referee then ordered the FIA to investigate the matter. On appeal, the respondent argued that the FIA failed to satisfy the notice requirements of ICWA and state law, and the Court of Appeals agreed. Respondent's answers, though inconclusive, were sufficient to require the court to ensure that FIA provided proper notice. The FIA merely sent a request for a determination of the child's Indian heritage to the Michigan Indian Child Welfare Agency and called one local tribe. The Court of Appeals noted the importance of the notice requirement in making a definitive determination of tribal membership. Only after the petitioner has complied with the notice requirements and no tribal membership has been established does the burden shift to the respondent to show that ICWA applies.

B. Petitioner's Responsibility

If it is known, the petitioner must include in the petition the child's membership or eligibility for membership in an American Indian tribe or band. If this information is not known, the petitioner must state that it is unknown in the petition. MCR 5.961(B)(5) and MCL 712A.11(4); MSA 27.3178(598.11)(4). If the child is a member or eligible for membership in more than one tribe, the child's tribe should be identified as the one with which he or she has the more significant contacts. 25 USC 1903(5).

C. Court's Responsibility

At the preliminary hearing or the first hearing on the record if there is no preliminary hearing, the court is required to inquire if the child or parent is a registered member of any American Indian tribe or band, or if the child is eligible for such membership. If either is true, the court must ensure that the petitioner notifies the tribe or band and must follow the procedures outlined below. MCR 5.965(A)(7). This requirement supersedes 25 USC 1912(a), which states that a court must know or have reason to know that an Indian child is involved in the proceeding before the notice requirements are applicable. See 25 USC 1921 (when applicable state law contains higher standards than ICWA, a court must apply those higher standards) and *In re Elliott*, 218 Mich App 196, 208–09 (1996).

20.4 Required Transfer and Notice of Case to Tribal Court

A. Mandatory Transfer of Case to Tribal Court

If the Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral, the matter must be transferred to the tribal court having jurisdiction. MCR 5.980(A)(1) and 25 USC 1911(a). Indian tribes have exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the reservation of the tribe. 25 USC 1911(a) and *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 43–53; 109 S Ct 1597; 104 L Ed 2d 29 (1989) (discussion of meaning of term "domicile" as used in ICWA).

If the child is a ward of a tribal court, the tribal court retains exclusive jurisdiction over the child notwithstanding the residence or domicile of the child. 25 USC 1911(a).

B. Notice of Proceedings to Parent and Tribe or Secretary of Interior

*See Form JC 48.

If the child does not reside on a reservation, and if the proceeding is involuntary, the court must ensure that the petitioner has given notice* of the proceedings to the child's tribe and the child's parent or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior. MCR 5.980(A)(2) and 25 USC 1912(a). The required notice must be by registered mail with return receipt requested. 25 USC 1912(a).

*See Section 20.11, below.

If the proceeding is voluntary, the court must also ensure that the requirements for a valid consent are met.*

C. Non-Mandatory Transfer of Case to Tribal Court

If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court must transfer the case to the tribal court unless either parent objects or the court finds good cause not to transfer the case to tribal court jurisdiction. MCR 5.980(A)(3) and 25 USC 1911(b). The perceived adequacy of the tribal court or tribal services shall not be good cause to refuse to transfer the case. MCR 5.980(A)(3).

The legislative history of ICWA suggests that the state court is the appropriate forum only when witnesses who will ensure protection of the rights of the child as an Indian, the rights of the parent as an Indian, and the rights of the tribe are more readily available than they would be in a tribal court proceeding. See HR Rep No 95-1386, at p 21, 95th Cong, 2d Sess, reprinted in 1978 US Code Cong & Ad News 7543–44.

20.5 Additional Time Required to Prepare for Proceedings

If notice is given to the Secretary of the Interior because the child's tribe or band is unknown, the Secretary must be given 15 days after receipt of notice to notify the child's parent or custodian and tribe. No foster care placement or termination of parental rights proceedings may then be held until at least 10 days after receipt of notice by the child's parent or custodian and tribe. In addition, upon request the parent or custodian or tribe must be given up to 20 additional days to prepare for the proceedings. 25 USC 1912(a).

20.6 Custodian's and Tribe's Rights to Intervene in Proceedings

The child's custodian or the tribe may intervene at any point in the proceedings. 25 USC 1911(c).

20.7 Emergency Removal of Indian Child From Home

MCR 5.980(B), dealing with emergency removal, states that an Indian child who resides or is domiciled on a reservation but temporarily located off the reservation shall not be removed from a parent or Indian custodian unless the removal is to prevent immediate physical harm to the child. The emergency removal must be terminated when it is no longer necessary to prevent immediate physical damage or harm to the child. 25 USC 1922. An Indian child not residing or domiciled on a reservation may be temporarily removed if the child's health, safety, or welfare is endangered. 25 USC 1922 and MCR 5.980(B).

20.8 Required Procedures for Placement of Indian Child*

*See also Section 20.10, below, for required procedures to terminate an Indian parent's parental rights.

Except for cases of emergency removal, an Indian child shall not be removed from the home unless there is clear and convincing evidence, including testimony by qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. See MCR 5.980(C)(1) and 25 USC 1912(e). See *In re Jacobs*, 433 Mich 24, 39–42 (1989) (where respondent-mother suffered a stroke that severely limited her ability to care for the children, and where the children's father was caring for and living with his mother, who was recovering from surgery, the trial court did not err in assuming jurisdiction and placing child outside of home).

In addition, the petitioner must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 USC 1912(d). See *In re Kreft*, 148 Mich App 682, 693–95 (1986) (requirements met by provision of parenting assistance, infant nutrition information, and housing assistance).

For purposes of ICWA, "expert witness" means:

- a member of the tribe recognized by the tribal community as knowledgeable in tribal customs related to family organizations and child-rearing practices;
- a lay expert with substantial experience with delivery of services to Indian families and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the tribe; or
- a professional with substantial education and experience in his or her field.

In re Elliott, 218 Mich App 196, 206–08 (1996), citing *In re Kreft*, 148 Mich App 682, 689–93 (1986). If cultural bias is not implicated in the case, the expert witness need not have special knowledge of Indian culture, but the witness must have more specialized knowledge than the normal social worker. *Elliott, supra,* at 207.

20.9 Preferred Placements of Indian Children

Unless the child's tribe has established a different order of preference, the Indian child, if removed from his or her home and placed in foster care or preadoptive placement, shall be placed, in descending order of preference, with:

(a) a member of the child's extended family;

(b) a foster home licensed, approved, or specified by the child's tribe;

(c) an Indian foster family licensed or approved by a non-Indian licensing authority;

(d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

MCR 5.980(2)(a)–(d) and 25 USC 1915(b)(i)–(iv). In addition, the court may order another placement for good cause shown.*

*See Form JC 51.

"Extended family" is defined by law or custom of the child's tribe or, if there is no applicable law or custom, as a person 18 years of age or older who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 USC 1903(2).

If the child's tribe has established a different order of preference by resolution, the court or agency making the placement must follow that order of preference if the resulting placement is the least restrictive setting appropriate to the needs of the child. 25 USC 1915(c).

The agency or court may consider the preference of the parent or custodian when appropriate, and the agency or court must give weight to the parent's

or custodian's desire for anonymity when applying either the statutory or tribal preferences. 25 USC 1915(c).

The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties must be applied when meeting the preference requirements. 25 USC 1915(d).

20.10 Required Procedures to Terminate Parental Rights

If termination of parental rights is sought in a case involving an Indian child, heightened evidentiary requirements apply. MCR 5.974(A)(1). The parental rights of a parent of an Indian child shall not be terminated unless there is evidence beyond a reasonable doubt, including testimony of qualified expert witnesses,* that parental rights should be terminated because continued custody of the child by the parent will likely result in serious emotional or physical damage to the child. 25 USC 1912(f), MCR 5.980(D), and MCR 5.974(F)(3).

*See Section 20.8, above, for a discussion of the requirement of expert witness testimony.

Thus, a dual burden of proof must be met in termination proceedings involving an Indian child. The court must find:

- beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and
- by clear and convincing evidence that termination is supported under one of the statutory grounds in MCL 712A.19b; MSA 27.3178(598.19b).*

*See Sections 18.27–18.40 for a discussion of these grounds for termination of parental rights.

In re Elliott, 218 Mich App 196, 209–10 (1996).

20.11 Requirements for Voluntary Foster Care Placement or Consent to Termination of Parental Rights

To obtain a valid consent from the child's parent or custodian to voluntary foster care placement or voluntary termination of parental rights, the following procedures must be followed:

- the consent must be executed in writing during a recorded proceeding before a judge of a court of competent jurisdiction;
- the presiding judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the child's parent or custodian;
- the judge must certify either that the parent or custodian understood the explanation in English or that it was translated into a language that the parent or custodian understood; and

- a valid consent may not be given prior to the birth of the Indian child, or within 10 days after the birth of the Indian child.

25 USC 1913(a).

The parent or custodian may withdraw his or her consent to the foster care placement at any time, and may withdraw his or her consent to termination of parental rights or adoption "at any time prior to the entry of a final decree of termination or adoption, as the case may be . . . ." The child must then be returned to the parent or custodian. 25 USC 1913(b) and (c).

In *In re Kiogima*, 189 Mich App 6 (1991), the Court of Appeals held that where a parent voluntarily releases his or her parental rights for purposes of adoption, the release may be withdrawn only prior to entry of the order terminating parental rights, not prior to entry of an adoption decree. The Court distinguished between a release of parental rights, whereby the release is given to a child placing agency or the Family Independence Agency, and a consent to adoption, whereby consent for adoption by a specific relative is given by the parent. Only in the case of a consent to adoption may the consent be withdrawn prior to entry of the adoption decree.

20.12 Invalidation of State Court Action for Violation of the Indian Child Welfare Act

An Indian child subject to foster care placement or termination proceedings under state law, a parent or custodian from whom the child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the placement or termination proceedings upon a showing that the court's action violated 25 USC 1911, 1912, or 1913. 25 USC 1914. A parent has standing to challenge an order independent of the participation of the tribe, even though the statute provides for a challenge by the child, parent or custodian, *and* the tribe. *In re Kreft*, 148 Mich App 682, 687–89 (1986).

See the following cases:

- *In re Morgan*, 140 Mich App 594, 601–04 (1985) (Court of Appeals invalidated trial court's order terminating parental rights, where trial court used the "clear and convincing evidence" standard rather than the "beyond a reasonable doubt" standard, failed to hear expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed), and
- *In re IEM*, 233 Mich App 438, 449–50 (1999) (where the Court of Appeals found that termination was proper under state law but that the Family Independence Agency failed to satisfy the notice requirements of the Indian Child Welfare Act, remand to the trial court for further proceedings was the proper remedy).

See also 25 USC 1920 (where custody of child has been improperly obtained or maintained, the court must decline jurisdiction and return child

to parent or custodian unless such return would subject the child to a substantial and immediate danger or threat of such danger).